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PETITION FOR WRIT OF CERTIORARI.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1899.

SUPREME COURT, U.S.
FILED
MAY 1 1899
JAMES H. McKENNEY
CLERK.

EX PARTE THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, CREATED BY THE LAWS OF THE STATE OF LOUISIANA, PETITIONER.

PETITION FOR WRIT OF CERTIORARI, REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT TO CERTIFY TO THE SUPREME COURT, FOR ITS REVIEW AND DETERMINATION, THE CASE OF THE CITY OF NEW ORLEANS, APPELLANT, VS. JOHN FISHER, TUTOR, ETC., ET AL., APPELLEES.

SAMUEL L. GILMORE,
City Attorney.
JAMES J. McLOUGHLIN,
Assistant City Attorney.
BRANCH K. MILLER,
*Solicitors for Petitioner.*

Filed _____ 1899.

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Clerk.

A. W. Hyatt Stat'y Mfg Co., N. O.—60,515.

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# Supreme Court of the United States,

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*To the Honorable Supreme Court of the United States:*

The petition of the city of New Orleans, a municipal corporation, created by act of the General Assembly of the State of Louisiana, No. 45, of its session of the year 1896, respectfully shows:

1st. That your petitioner is a municipal corporation, created by legislative act, as aforesaid, its government duly organized, and exercising functions and powers, and discharging the duties, thereunder.

2d. That on May 11th, 1896, Mrs. M. M. Fisher filed, in the Circuit Court of the United States for the Eastern District of Louisiana, her bill against your petitioner, and the School Board of the city of New Orleans, setting forth that Oratrix had obtained a judgment in the Circuit Court, against the said Board of School Directors, for a sum in excess of ten thousand dollars; that the said Oratrix had likewise obtained two other judgments against the said Board, in the Civil District Court for the parish of Orleans, aggregating in amount many thousands of dollars; that all of said judgments were final, and were made payable out of school taxes levied by the city of New Orleans, for years prior to 1879; that the said taxes out of which said judgments should have been payable constituted a trust fund, levied by your petitioner for the purpose of paying the expenses of the public schools of the city; that the latter had failed to collect the said taxes punc-

tually, and that it was through her fault and negligence that the same remained uncollected, and that by reason of her neglect she had become liable for the amount thereof uncollected; that the same carried interest at the rate of 10 per cent. per annum, and that your petitioner has never paid to the School Board any of the said interest, but had misapplied and diverted it "to other unlawful purposes;" that the School Board had created the obligations (upon which said judgments had been rendered), "by virtue of contracts which were legally entered into," and that, "Oratrix was protected by the constitution of the United States from any impairment of her contract;" that in violation of this constitutional right, the State of Louisiana had adopted Act 82, at the session of its General Assembly of 1884, which directed that the property of delinquent tax payers should be sold for what it would bring, and that all taxes due thereon, by virtue of the said sale, should be cancelled; that under this statute, the city allowed the property upon which the school taxes were due, to be sold for taxes due the state, and had caused the city taxes, including the school taxes, to be cancelled; that she was thus guilty, first, as a delinquent trustee, for not having enforced the collection of said taxes, and, second, for having failed to protect the interest of Oratrix at the said state tax sale; that the cancellation thus made amounted to many thousands of dollars."

That the city, at various times, passed ordinances, cancelling and annulling the said taxes, and remitting the interest thereon; that Oratrix was "unable to give the exact amount of each kind of violation of her obligations by the trustee, and that it is absolutely necessary to make the city of New Orleans account for the various amounts which had been lost to Oratrix through the unfairness of the said trustee."

3d. That the Board of School Directors, to whom the city should account, had refused to demand such an account, and would continue to do so, and Oratrix would be left without a remedy; that the fund administered by the city at the date of the filing of the bill seemed to be insufficient to satisfy the demands of all creditors who were entitled to be paid out of the same; that the judgments of Oratrix were made directly payable out of school taxes levied prior to 1879, and that she had an equitable lien thereagainst, enforceable before a court of equity; that the certificates held by Oratrix, which were merged into judgments, had been under the law received by the city directly in payment for school taxes, without the intervention of the Board of School Directors, and that the bill was brought against the city and the Board of School Directors for an account.

4th. By supplemental bill, filed August 4th, 1896, it was set up, that the city had, at various times, seized for taxes, for the years during which the claims for Oratrix arose, a number of houses and

lots, and had purchased the same in satisfaction of the taxes due, and that, "a resulting trust had, under the law, followed the property, and that Oratrix was entitled to have the value of the said real estate realized upon, and the rents accounted for, by the city;" that Oratrix was unable to give an exact statement of the property, but averred that the same largely exceeded thirty thousand dollars in value; that the city allowed the property to go to waste; that Oratrix had a statutory lien upon all of the same, and was entitled to the appointment of a receiver to take charge of it, and realize upon the same, under order of court.

5th. The city demurred generally to the original and supplemental bills, on August 28th, 1896, which demurrers, after argument, on March 21st, 1897, were overruled. (R., pp. 5-6-7-10.)

6th. On March 12th, 1897, the city answered (R., pp. 11, *et seq.*), setting up:

(A) Admitting the rendition of the judgment mentioned in complainant's original bill, likewise their finality.

(B) A denial that the school taxes out of which the judgments were payable were a trust fund levied by the city for the purpose of paying school expenses.

(C) A denial that it had ever failed to collect the taxes punctually, or that any of the same remained uncollected, or, if such latter were not the fact, that this was not by reason of any negligence on the part of defendant; and a further denial that the city was liable for any of the uncollected taxes, if any such there were.

(D) An admission that the city had never paid to the School Board, any interest which she may have collected on any such taxes, but a denial that such interest was the property of or due to, the School Board; a denial that she ever misapplied or diverted such interest to any unlawful purposes; concluding with the averment that by express provisions of law, all interest collected on delinquent taxes, was specially set aside for certain purposes, and could not by her be used for school purposes, or for any other purpose than that required by law.

(E) A denial that the School Board created the obligations against school taxes, set out in the bill, by virtue of any contract entered into, with the further denial that Oratrix had any right to invoke any protection of the federal constitution.

(F) A denial that Act 82, of 1884, violated any constitutional rights of Oratrix; that said act was within legislative authority.

(G) A denial that the city allowed any property on which school taxes were due to be sold for taxes; also, that she caused any school taxes to be cancelled; she denied that she was guilty as a delinquent trustee, and that she was ever a trustee in the premises, or failed to enforce the collection of any taxes of which it was her duty to enforce;

also, that it was her duty to protect the interests of Oratrix, if she had any, at the tax sales described, with another denial that Oratrix had such interests.

The answer contained, besides these, additional special denials of all the facts set up in the bill, particularly that there was any privity between the city and the School Board, or between complainant and the former.

(H) It was further set up, in defense, that if any cause of action for an accounting by the defendant ever existed in favor of the School Board, the same was effective and executory in 1880, and became actionable in that year, and the years following 1873, up to 1879, inclusive; that the said cause of action, if it existed, was personal to the School Board, and could only be exercised or availed of by the School Board, which action was prescribed by the lapse of ten years from and after the lapse of each of said years.

(I) There was further denial, that there was any fund at the date of the filing of the bill, or at any other time, administered by the city, and that complainant had any equitable lien enforceable against the city of New Orleans; that the certificates of plaintiff were ever received by the city, in payment of school taxes, without the intervention of the School Board, or that the former sold for taxes, and purchased in settlement thereof, any houses and lots, or that any school taxes were due upon the same, if the other averments of the bill were true, or that complainant had the resulting trust claimed by her bill, or that she was entitled to the value of any such real estate or that the property so purchased by the city was of the value of thirty thousand dollars, or any part thereof, were all in each instance expressly denied.

7th. On different dates thereafter, interventions were filed by F. J. Gasquet, Jose Venta, Mary Quinlan and Jean Pomes, setting up claims generally similar in character to those made by complainant's bill.

8th. The whole matter having been referred to a master, the latter, on May 22d, 1897, filed his report (R., pp. 25, *et seq.*), under the order of reference, which directed him (R., pp. 17 and 21), to take a full, true, fair and perfect account of,

All the funds, principal and interest, received by the city for school taxes levied for the years 1871 to 1878, inclusive; he reported these to be,

(a) In the principal of said taxes collected and not paid over, amounting to..... $23,180 05

(b) In interest collected upon the same taxes, up to January 1st, 1897, to which the School Board would be entitled. 48,758 75

Making a total of..... $71,938 80

which said sum, the report declared, was owing by the city to the School Board.

The report further set out:

(c) That complainant abandoned any proof to show that the city owed anything on account of property purchased for taxes.

(d) That the city owed nothing on account of interest illegally remitted, but could be only held for the amount of interest she actually collected.

(e) That complainant and intervenors had proved their claims against the fund mentioned, by judgments rendered in their favor, as follows:

| | |
|---|---|
| M. M. Fisher | $11,094 87 |
| " | 8,802 39 |
| " | 5,864 64 |
| T. J. Gasquet | 57,059 69 |
| Jose Venta | 21,297 72 |

9th. This report was excepted to by the city (R., pp. 36-37), on the following grounds:

That the master, under the reference, had no authority to report upon any question of law, and his conclusion that the interest upon taxes was part of the taxes, and belonged to the party to whom the taxes belonged, was averred to be erroneous, and excepted to; the conclusion of the master that the taxes collected from 1871 to 1878 were due by the city to the School Board was also excepted to.

10th. On June 29th, 1897, your petitioner filed what was termed an "exception to the jurisdiction of the court, *ratione materiæ et personæ*," to the effect that the bill contained no averment that the suit could have been maintained by the assignors of the claims sued upon by the complainant, in the suit which formed the basis of the present action; on November 29th, 1897, the exceptions to the master's report was fixed for trial on December 4th; they were not tried on that day, nor on December 11th, to which date the matter was continued, and on that day, on motion of the city, there was a further continuance to December 17th; on December 20th, 1897, the city filed a plea in abatement (R., pp. 49, *et seq.*), to the effect that Mrs. M. M. Fisher, the complainant, was a citizen of the State of Louisiana, residing in the city of New Orleans, at No. 2335 Chippewa street; that said plaintiff and defendant were both citizens of the State of Louisiana, and that by reason thereof the Circuit Court was without jurisdiction.

The plea further recited, that at the time plaintiff instituted her suit in the Circuit Court, in which she obtained one of the judgments described in her bill, she was a citizen of Louisiana, and had remained such continuously ever since; and was, on the said date, December 20th, 1897, a citizen of such state; that defendant did not discover these facts until after its exceptions had been filed to the

master's report; that defendant had made due and diligent search to discover the facts, through the Secretary of State, and through the Consul General of the United States, in Havana, Cuba; that in bringing in the Circuit Court her said original suit, upon which she had already obtained judgment, being No. 12,060 of the docket, and in filing the present suit, complainant's representation that she was a subject of the Kingdom of Spain, was for the purpose of showing jurisdiction in the Circuit Court, by a fraud upon that court; that by inducing the defendant to demur and answer, the latter being at the time ignorant of the true facts, complainant was practicing and had practiced a fraud upon the Circuit Court, to obtain its jurisdiction; that defendant was mislead by the said fraud and misrepresentation, and that equity required that it be permitted to withdraw, or to treat as withdrawn, the demurrer and answers filed by it, and then and there to file its plea to the jurisdiction; upon objection being made by the complainant and intervenors to the filing of said pleas, and after hearing counsel of all parties, the court refused the application to file the same, as the order states, "at this time."

In the meanwhile, on December 13th, 1897, prior to the tender of the plea to the jurisdiction just mentioned, complainant obtained a rule to show, returnable on December 17th, why "two papers filed in this cause, and styled 'exception to the jurisdiction of the court, *ratione materiæ et personæ*, and plea in abatement,' should not be stricken from the files of the court."

On December 20th, 1897, the motion was granted, and the court ordered the documents to be taken from the files.

On December 21st, 1898, the court rendered its decree, adjudging that the city of New Orleans, as trustee of the special school taxes levied and collected for the years 1871 to 1878, inclusive, be condemned to pay plaintiff and intervenors the said taxes received and collected by her, as follows: $71,938 78, with five per cent per annum interest on $71,139 60, from January 24th, 1881, and on $799 18, from May 11th, 1896, until paid; this decree was afterwards amended by order of the court, April 28th, 1898, so as to allow interest on the amount recovered, to-wit, $71,139 60, from February 21st, 1898, the date of the decree, instead of from January 24th, 1881; the amount of this judgment to be divided and distributed pro rata, up to their full claims, to the intervenors already named, and to other persons who had appeared by way of intervention, in the sums ascertained to be due to them respectively.

11th. That on March 2d, 1898, a petition was filed by John Blackadder, which declared him to be a citizen of the State of Louisiana, setting forth that Mary Blackadder, the wife of John Fisher (being the same Mrs. M. M. Fisher, complainant in the suit mentioned), had departed this life on February 26th, 1898, leaving, as the issue of her

marriage with John Fisher, four minor children, residing in the said city; that the said Fisher was then absent from the said city, in the Island of Cuba; that during his absence, and until such time as he might return, and be confirmed by the probate court as the natural tutor of his minor children, that petitioner desired to represent his said grandchildren in the prosecution of the suit of Mrs. M. M. Fisher and her husband against the city of New Orleans, wherein a decree had been rendered in their favor for an accounting, under number 12,516 of the docket of the court; the petition concluded with a prayer that Blackadder be appointed *prochein ami* of the said minor children, with power to represent them, and prosecute the suit, until such time as their father might return to the city of New Orleans, and qualify and be confirmed as their natural tutor; the court made an order in accordance with the prayer of the petition, appointing Blackadder therein for purposes prayed for.

12th. On March 5th, 1898, the city of New Orleans, by motion, which, after suggesting the death of Mrs. M. M. Fisher, the complainant, and the abatement of the suit by reason thereof, and its desire to make application for a rehearing, but its inability to do so until proper parties had been named to represent the complainant, obtained an order for the filing of the motion, for the giving of notice to the complainant, and a stay of further proceedings in the case, until the further order of the court.

On March 5th, on the suggestion that Blackadder had been appointed *prochein ami* of the minors Fisher, and that they had been made parties to the suit, and that in consequence thereof the order staying proceedings should be set aside, obtained an order for the city to show cause why the said order should not be rescinded.

On April 22d, 1898, the court made an order, rescinding the stay order of March 5th; on the same date, John Fisher, by motion, on the suggestion that he had been appointed and qualified as natural tutor of his minor children, obtained an order that in that capacity he be made party complainant, "to these proceedings;" acompanying the motion was a copy of his letters of tutorship, issued by the Civil District Court for the parish of Orleans.

13th. That on April 23d, 1898, both the city of New Orleans and the School Board presented to the Circuit Court an application for a rehearing, assigning seventeen grounds therefor, each setting out specifically what was averred to be an error to their prejudice; among these were particularly the following:

(a) That the evidence did not warrant the allowance of interest upon $71,139 60 from January 21st, 1881, because the master's report did not allow such interest, but stated that such amount was due from the filing of his report, to-wit: May 22d, 1897; that, hence, it was error to allow interest from January 24th, 1881; that if this sum

were due at all, it was only due from the time the master said it was so due, and this was May 22d, 1897; that the allowance of such interest for a period of nearly seventeen years, prior to the making of the master's report, was an error.

(b) That interest was improperly allowed in favor of Mary Quinlan, upon her judgment of $5,373 78, for the reason that her judgment allowed her no interest.

(c) That there was error in decreeing the city liable for any part of the taxes of 1881, for the reason that the evidence showed that no part of the claim sued upon arose during the year 1871, and further, that the act of the legislature, which directed the city to impose a special tax of 1¼ per cent., was passed in the year 1873, and, therefore, could not affect the taxes of 1871; that complainant claimed no share in the taxes of that year, or any interest thereon, and in allowing her the same, the court awarded her more than she demanded; that the amount awarded, on account of the taxes of 1871, was $7,821 17, and the delinquent interest thereon, $9,332 81, making a total allowance of $17,153 98 erroneously awarded by the decree.

(d) That the court in error included in its decree the sum of $11,933 27, which the master's report declared was the amount of discount allowed by the city to the tax payer for prepayment of school taxes; this amount the city, as stated, never actually collected, while the bill only claims an accounting of such taxes and interest as the city, in fact, did collect, and in this respect the decree has allowed more than was claimed by the bill.

(e) The court was in error in allowing as part of the sum for which its decree was rendered the sum of $1,816 55, as collected, for the year 1874, and not paid, or accounted for, to the School Board; this for the reason that by the testimony offered by complainant herself, it was shown that the city had paid over to the School Board all that she had collected for the said year 1874, and in no event should she be held responsible, under the prayer of complainant, for any sum she did not collect.

(f) That the court erred in approving the finding of the master, that the interest or penalty on delinquent school taxes formed part of the taxes themselves, and should have been turned over to the School Board; that in any event, if the court were correct in such conclusion, it should apply only to such taxes, the principal and interest of which the city had never paid or accounted for to the School Board, and not taxes the principal and interest of which she had already paid to the said Board, years ago; that from the master's report it appears that only $23,108 23 of the principal of the school taxes collected by the city had never been paid over to the Board, and it is only on this sum, if any at all, that the city would be liable for the interest or penalties.

(g) That the court was in error in ordering to be stricken from the record the two documents filed June 29th and July 1st, 1897, for the reason that they remained on the files from June to December, without any objection on the part of complainant, and it was then too late, on December 20th, to raise any objection thereto; that the most that could have been required of defendant was to amend the plea to the jurisdiction, by affixing the solicitor's certificate.

(h) That it was error for the court to refuse to allow defendant to file the affidavits and plea to the jurisdiction, *ratione personæ*, December 20th, 1897, for the reason that under the law such a plea can be filed at any time; furthermore, as the city's plea and affidavit set up a charge of fraud against the complainant, in equity, such a charge having been made, and supported by affidavit, it was the duty of the court to entertain the plea.

(i) That the court erred in not sustaining the plea of prescription made in the answers of defendant, for, as the complainant's cause of action arose in 1873, and subsequent years, the last year being 1879, the same was barred and extinguished by the prescription of ten years.

(j) That the court erroneously held that the school taxes, out of which complainant's judgments were made payable, were a trust fund, levied by the city of New Orleans, for the purpose of paying the expenses of the public schools of the said city; that the court was in error in holding that there was any privity between the city and complainant, and that she had the right to claim an accounting from the former; that the only person who could call for the same was the School Board, and the court erred in permitting any other person so to do.

(k) That the court was in error in ordering the whole fund ascertained by the master to be paid over to complainant and intervenors in this suit, because if such fund is a trust fund, it is held for the benefit of all interested in the same, and that complainant and intervenors would have no right to any more than their just proportion of the same; that there are other holders of school certificates, not parties to this suit, who were not notified by publication, or cited, and that to ascertain what proportion of the fund complainant and intervenors were entitled to receive, a reference to the master was necessary.

14th. That on April 28th, application for a rehearing was refused, whereupon the case was subsequently carried by appeal to the Court of Appeals for the Fifth Circuit; along with the motion of appeal, was filed the following assignment of errors:

I.

It was error for the court to decree judgment against the city for any part of the taxes of 1871, for the reason that the evidence shows

that no part of the complainant's claims arose during the year 1871, and further, that the act of the legislature which directed the city to impose a special tax of one-fourth per cent. was passed in the year 1873; therefore could not affect the taxes of 1871.

Furthermore, it is error for the court to allow a decree against the city for taxes of 1871, for the reason that the complainant does not claim any share in the taxes of 1871, or any interest thereon, either in her original or supplemental bill, and it was error for the court to allow her more than she claimed. Consequently the amount declared due out of the taxes of 1871, to-wit, seven thousand eight hundred and twenty-one 17-100 dollars, and the delinquent interest of taxes of 1871, nine thousand three hundred and thirty-two 81-100 dollars, were allowed in error, and should be deducted.

II.

This being a suit for an accounting, the court erred in giving judgment against the city for money that she never collected, in that the judgment includes the sum of eleven thousand, nine hundred and thirty-three 27-100 dollars, which the master's report states is a discount allowed by the city to the tax payer for payment of school taxes, and as the bill only claims and asks that the city be compelled to pay over the actual amount of cash collected, and as this money was never collected, it was error for the court to order it paid over. This being only a suit for an accounting, judgment, cannot be had in the bill for anything but actual money collected.

III.

The evidence shows that the full amount of money collected for 1874 school taxes was turned over to the School Board (see testimony of Clark Steen, and his report, offered in evidence by complainant, R., p. 83) and such being the case, it is urged that it was error for the court to make the city pay over any more money out of the taxes of 1874, the city having already paid over all that she owes on that year. Such being the case, the amount of $10,816 59 and $209 50, proportion of interest on school taxes for 1873, and the proper proportion of principal for school taxes for 1874 (to ascertain the amount of which a reference to the master is necessary), are not due to the School Board. While it is true that all back taxes prior to 1879 are lumped into one fund, we urge that, in calling for an accounting, it is sufficient for the city to show, in order to be discharged as far as the taxes of any particular year are concerned, that she has paid over the full amount of taxes due the School Board for that year, and having done this, with the taxes for 1874, it is error for the court to order her to turn over any more of the taxes for that year.

IV.

Complainant's judgment, No. 12,060, and her other judgments, are law judgments, and she has ample remedy in law; hence, no right to invoke the equity side of the court.

V.

Complainant had no right to sue the city of New Orleans, because her judgments are against the School Board only, and she does not allege that the city owes the School Board anything.

VI.

The evidence shows that in suit No. 12,060 the city was garnisheed on July 12th, 1894, under a *fi. fa.*, and answered, under oath, that she had one thousand eight hundred and ninety-three and 9-100 dollars to the credit of the school fund prior to 1879 on that date, and having paid that amount over to Mrs. Fisher, under her judgment, it was error for the court not to hold that said payment to and acceptance by Mrs. Fisher, complainant herein, estopped her from traversing said garnishment, as she is doing by this proceeding, and the court should have held such payment and acceptance as an estoppel and *res judicata* concerning all collections made up to July 12th, 1894.

VII.

The court erred in approving the finding of the master that the interest or penalty on delinquent taxes formed a part of the taxes, and should be turned over to the Board. But even though this were correct (which, of course, is not admitted), the court erred in ordering the city to pay over the penalty on taxes which she had already paid over. In any event, she should not be compelled to pay over the penalty on any taxes, except on those taxes which are still in her possession. In other words, the master's report shows twenty-three thousand one hundred and eight 3-100 dollars of principal, and that only the penalties on this twenty-three thousand one hundred and eight 3-100 dollars should be turned over, and not the penalties on the taxes that were turned over to the Board years ago.

VIII.

It was error for the court to have stricken from the record the two documents filed June 29th, and July 1st, 1897, for the reason that they remained on the files, from June to December, without any objection on the part of the complainant, and it was too late then for her to make the objection she did on December 20th, 1897. The most that should have been required of defendants was to amend the plea to the jurisdiction by affixing the solicitor's certificate.

IX.

It was error for the court to refuse to allow defendant to file affidavit and plea to the jurisdiction, *ratione personæ*, December 20th, 1897, for the reason, that under the law, such a plea can be filed at any time; furthermore, as the city's plea and affidavit set up a charge of fraud against the complainant, in equity, such charge having been made and supported by affidavit, it was the duty of the court to entertain the plea, to let the fraud be proven.

X.

It was error for the court not to have allowed the plea of prescription made in the answers of defendants, for as the complainant's cause of action arose in 1873 and subsequent years, the last year being 1879, the same was prescribed by the prescription of ten years, and consequently her suit would have been dismissed on the consideration of this plea.

XI.

Her judgment in suit No. 12,060 is based upon choses in action, not suable in this court, as there is no allegation that the original assignors could sue in this court; therefore the court had no jurisdiction *ratione materiæ*, and it was error for the court to assume jurisdiction herein.

XII.

The court erred in holding that the school taxes out of which said judgments have been made payable, is a trust fund levied by the city of New Orleans for the purpose of paying the expenses of the public schools of said city.

XIII.

The court erred in holding that there was any privity between the city of New Orleans and Mrs. Fisher, and in holding that she has any right to claim an accounting from the city of New Orleans. Defendant city avers and declares, that the only person who could call for such accounting is the said School Board, one of the defendants herein, and the court erred in permitting any other person than the said School Board to call for such accounting.

XIV.

It was error to order the whole fund ascertained by the master, to be paid over to the complainant and intervenors in this suit, because if said fund is a trust fund, it is held for the benefit of all interested in such fund, and the only part that should be paid to complainant and intervenors is their proportion of the same; in other words, it was error for the court to ignore the rights of other certificate hold-

ers not parties to the suit, and who were not notified by publication, or cited herein. And to ascertain what proportion of the fund should go to complainant and intervenors herein, a reference to the master is necessary.

Petitioner sets out at length in this petition the grounds assigned for a rehearing in the Circuit Court, and those set forth in the said assignment of errors, and prays that the same be taken together as an assignment of errors, to serve for this application, and for the hearing and for all other purposes of this cause, should the writ of *certiorari* hereby applied for be granted.

15. That shortly after the said decree of the Circuit Court became final and executory, by the lapse of time, during which an appeal could be taken by defendant from the said decree, with supersedeas, complainant and intervenors instituted in the Circuit Court a suit for a mandamus against the Board of Liquidation of the City Debt, a corporation created by act of the General Assembly, No. 133, of 1880, which said act, subsequently amended by Acts 67, of 1884, and 110 and 128, of 1890, charged by said act with the exclusive direction and control of all matters relating to the bonded and judgment debt of the city of New Orleans; that said suit was founded upon the averment principally that, under the aforesaid legislative acts, the petitioners therein were entitled to be paid the amount of the said decree of the Circuit Court out of funds derived from the sale of bonds issued under said Act 110, of 1890, and the amendment to the constitution of the state, which the said act was designed to carry into effect; that the said suit for a mandamus sought to obtain satisfaction, by payment and discharge, of the said decree of the Circuit Court, of the amount for which the same was rendered, to-wit: $71,139 60 with 5 per cent. interest per annum thereon from Feburuary 24th, 1898, and $799 18, with like interest, from May 11th, 1896; that there was judgment in said suit in favor of plaintiffs and against defendant making the mandamus peremptory, whereupon it was carried by writ of error to the Court of Appeals, all of which will fully appear by reference to copies of the petition, answer and judgment in said cause, filed herewith, and marked "Exhibit A"; that the said suit was an acquiescence in the decree of the said Circuit Court, and an affirmance of the correctness thereof, and deprived complainant of any right to urge in the Court of Appeals, on the cross-appeal which was taken by them, after the record of the appeal of defendant had been lodged in the said Circuit Court of Appeals; that by invoking the power of the court to enforce the said judgment, complainant was estopped to urge any error therein in any respect; that the present suit of Mrs. M. M. Fisher, et al. vs. the city of New Orleans, and that of John Fisher, Tutor, etc., et al. vs. Board of Liquidation of the City Debt, which was the title of the suit by

which said mandamus was sought, were both argued and submitted in the said Court of Appeals on the same day, and that in consequence thereof, the said court knew judicially all the facts and issues involved in each case, and hence, was cognizant that the complainant and intervenors in the present case had acquiesced, as aforesaid, in the said decree of the Circuit Court; all as will more fully appear by what is set out hereinafter.

16th. That this cause was heard in the Court of Appeals on December 13th, 1898, and on March 14th, 1899, the said court rendered an opinion and entered a decree overruling all of the defenses set up by defendant, and deciding against defendant all the questions raised by its assignment of errors, and entered a decree amending the decree of the Circuit Court, by allowing interest on $71,139 60 of the total sum thereby awarded from January 24th, 1881, instead of from February 21st, 1898, as allowed by the Circuit Court, and in other respects affirming the said decree.

17th. That petitioner made timely application to the said Court of Appeals for a rehearing, assigning therefor the following grounds, in support thereof:

"That since their appeal was filed in this cause, and before the cross-appeal was taken by the defendants in error herein, the said defendants in error brought a proceeding in the Circuit Court of the United States of the Fifth Circuit and Eastern District of Louisiana, entitled United States *ex rel.* John Fisher, Tutor etc., vs. Board of Liquidation, No. 12,740 of the docket of said Circuit Court, wherein said Fisher, *et a/s.* admitted, under oath, that the judgment obtained in this proceeding, No. 12,516 of the docket of said court, for $71,938 74, with legal interest from February 21st, 1898, was final, and they ask said court, in said proceeding No. 12,740, to grant them a mandamus, directed against the Board of Liquidation, for payment of this judgment.

"Your petitioners represent that this is newly discovered evidence arising since the appeal herein was taken to this Honorable Court, and the whole record of the said suit No. 12,740 is now lodged in the Honorable Court of Appeals as No. 746 of the docket thereof, and your petitioners pray leave to have the same filed herein, and considered in connection with and as a part of this petition for rehearing.

"Now, your petitioners show that said suit No. 12,470 and said prayer for mandamus constitute a full and final acquiescence in the judgment and decree rendered in the instant case, No. 747 of this court, and No. 12,516 of the United States Circuit Court; and that by their action in taking said proceeding, said defendants in error are estopped and precluded from asking any amendment of said judgment which might increase the amount of the same.

"Petitioners further show that the court erred in refusing to take

notice of the fact which is apparent on the face of the record, to-wit: That Mrs. M. M. Fisher is not a subject of Spain, but on the contrary is a citizen of Louisiana.

"Petitioners show that the judgment in this case is solely in favor of Mrs. M. M. Fisher, and that her death certificate, which is found on page 129 of the transcript, shows that she was a native of Virginia, and had lived in New Orleans for thirty-eight years prior to her death. And your petitioners show that the affidavit of solicitor for Mrs. Fisher, which is found on page 141 of the transcript, sets forth as a fact that the statement that she and her husband are Spanish subjects, was wrong, and that, on the contrary, he is a British subject, and had never been a Spaniard. And this statement relative to John Fisher is corroborated by his own affidavit printed on page 142 of the transcript. Consequently, petitioner believes that it was error for the court not to have taken notice of these facts, which are apparent on the face of the record, and also of the fact that these statements were made after the decree had been rendered by the court below, and no opportunity was given petitioners to traverse the same.

"Your petitioners further claim and show, that there was error on the part of this court in refusing to go behind the judgment originally obtained by Mrs. M. M. Fisher in suit 12,060 (page 60 of the transcript), in order to ascertain the fact as to whether or not the record of that case showed that Mrs. M. M. Fisher was entitled, under her pleadings, to avail herself of the jurisdiction of the United States Circuit Court, and in support of which contention petitioners again cite the case of Wisconsin vs. Pelican Insurance Company, 127 U. S. 292, and New Orleans vs. Benjamin, 153 U. S. 411.

"Petitioners also claim that there is error in the opinion and decree of this honorable court in its reasoning upon the sixth assignment of error, to-wit: 'That in view of the court the garnishment proceedings shown in the record were against the treasurer of the city of New Orleans as *ex officio* treasurer of the School Board,' whereas, in point of fact, the record shows that there were two separate garnishment or *fi. fa.* proceedings taken; one on page 120 of the transcript shows: that the marshal collected $312 56 from Charles H. Schenck, *treasurer of the city of New Orleans*, and the other, on pages 121 and 122 of the transcript, in answer to the garnishment, shows that Charles H. Schenck, treasurer of the city of New Orleans *and ex officio treasurer of the Board of School Directors*, had in his hands $1893 09, which was duly paid over to Mrs. Fisher.

"And your petitioners show that these two separate answers and returns show that Mr. Schenck was garnisheed in two different capacities. First, as *treasurer of the city of New Orleans*, and, second, as *treasurer of the School Board*. Consequently, under the law, the return under the garnishment as treasurer of the city of New Orleans

should be held as constituting an accounting up to that date between the plaintiff in this proceeding, the School Board and the city of New Orleans.

"Your petitioners further believe that there is error of the court in its statement relative to the ninth assignment of error, which reads as follows: 'The ninth assignment of error does not appear to be based on any affirmative ruling of the court below. It appears that leave was asked to file a plea to the jurisdiction and an order to show cause issued, but no ruling in the premises.'

"Your petitioners, in support of this contention, respectfully refer your Honors to the plea itself, which is found on page 49 of the transcript, and the order and ruling of the court relative to the same, which are found on page 51 of the transcript, and which reads as follows:

"EXTRACT FROM THE MINUTES.

"November Term, 1897.

"NEW ORLEANS, MONDAY, December 20, 1897.

"Court met pursuant to adjournment.

"Present: Hon. Charles Parlange, District Judge.

"MRS. M. M. FISHER
"*versus*
"CITY OF NEW ORLEANS. } No. 12,516.

"This day, in open court, J. J. McLoughlin, Assistant City Attorney, of counsel for defendant, presented a plea to the jurisdiction and a motion to fite same.

"Whereupon counsel for complainant and intervenors objected to the filing of the same on the grounds urged by them. *After hearing the counsel for both parties, the court refused the application to file said plea at this time.*"

"And it is this ruling of the court below which petitioners respectfully say was an error of that court, and we ask your Honors' review of the same.

"The law makes it the duty of the court at any time that it becomes apparent that a fraud has been perpetrated upon the court, and jurisdiction has been acquired by fraud, to stop the proceedings and investigate the question of jurisdiction. In support of which contention we refer your Honors to the fact that the plea of fraud and want of jurisdiction was raised by your petitioners, as appears from the plea found on page 49 of the transcript, and the judge below was wrong in the order which he made when same was presented to and argued before him, and which order is found on page 51 of the transcript, as aforesaid, refusing leave to file same.

"Under this state of facts we claim that the court should be guided by the principle laid down by the Supreme Court in Grace vs. Insurance Company, 109 U. S. 278, and thereunder remand this cause to the Circuit Court with orders to consider and try this sworn plea of fraud and lack of jurisdiction.

"Petitioners believe the court erred in holding in its reasons for overruling the seventh assignment of errors that the city is liable for interest collected on back school taxes. We respectfully submit that there is no authority cited by the defendants in error or by the court in support of the contention that the interest is a part of the taxes, and on the contrary, authorities were cited in our brief, all holding that penalties form no part of the tax, and we respectfully urge upon the court to reconsider this question, as we believe a consideration of the fact that we have cited numerous authorities in support of our contention, and our opponents have not cited a single decision in their favor, should be construed as a recognition of our position.

"We also respectfully submit that there is error in the court's conclusion that Sec. 3015 of the Civil Code applies to the city of New Orleans.

"The city was not a voluntary trustee in this matter, the collection of this money was forced upon her, and she had to collect it entirely at her own expense. Besides, the city charter of 1882 set aside all money collected from interest on delinquent city taxes as sacred to the public improvement fund, and the city has already expended that money on public improvements, as ordered by the Act 20 of 1882, Sec. 65, and it is wrong for the court to require her now, after she has expended it for that purpose under the mandate of the law, to turn it over to creditors of the School Board nearly twenty years after its collection and disbursement.

"Wherefore, petitioners, plaintiffs in error, pray that this petition for a rehearing be filed and considered, and that notice thereof be given to all parties in interest. And that, after due consideration and hearing, this petition be granted and rehearing had, and that the decree hereinbefore rendered be modified or set aside, so as to grant to petitioners the relief prayed for.

"And your petitioners further pray that in any event so much of your decree as increases the amount of said judgment as originally fixed by the decree of the lower court be set aside, and that the cross-appeal of said defendants in error be dismissed upon consideration of the transcript and proceedings No. 746, of the docket of this honorable court, which your petitioners plead as *res adjudicata* to the demands of said cross-appeal.

"And petitioners pray for such orders, rulings, process and decrees herein as may do justice and equity to and between all parties herein involved.

"And petitioners pray for all special, equitable and general relief."

18th. That on the —— day of March, 1899, the said court entered a decree, denying the said rehearing.

Petitioner here also assigns, as error, for the purposes of this application, and for all other purposes of this cause, should the writ of *certiorari* herein be granted, all the grounds for a rehearing, and the errors set out, in the said last mentioned application for a rehearing.

And your petitioner further assigns the following as error in the decree of the said Court of Appeals, in addition to the above.

I. That, as aforesaid, the complainant, Mrs. M. M. Fisher, having departed this life, after the entry of said decree of the Circuit Court, there was substituted as complainant, in her place and stead, her surviving husband, John Fisher, appearing in the capacity, after having qualified as such, of natural tutor of the minor children of himself and his deceased wife, the original complainant; that thereupon the said John Fisher, tutor, and all of the intervenors whose claims had been recognized by the decree of the Circuit Court, joined as plaintiffs in the suit for a mandamus hereinbefore described, against the Board of Liquidation of the City Debt, to pay and discharge the said judgments with funds derived from the sale of bonds of the city of New Orleans, issued under said Act No. 110, of 1890, and the constitutional amendment which it was designed to carry into effect; that the said suit for a mandamus was an acquiescence by the plaintiffs therein in the correctness of the said decree of the Circuit Court, and a judicial declaration that there was no error in the same to their prejudice; that in law, this would have confined the substituted complainant and intervenors in the said suit of Mrs. M. M. Fisher, et als. vs. City of New Orleans, or any review of the said decree in the Court of Appeals, to a demand for an affirmance of the decree of the Circuit Court, and was a bar to their urging any error in the same, and deprived the Court of Appeals of any power to amend the decree of the Circuit Court to the prejudice of defendant, or to the advantage of the said substituted complainant and intervenors; that notwithstanding this, on a cross-appeal taken by the latter, argued and submitted, together with the appeal of said defendant, and the appeal also of the defendant in the suit for a mandamus against the Board of Liquidation of the City Debt, against whom there was judgment in the Circuit Court, making peremptory the alternative mandamus issued in that cause, and hence, all of the pleadings, issues and facts

involved in both such cases, were before, and within the cognizance of, the said Court of Appeals, at the time of the said argument; and there was error in the decree of the Court of Appeals in its amendment of the decree of the Circuit Court, by the allowance of interest from January 24th, 1881, instead of from February 21st, 1898, as awarded by the Circuit Court.

That the said suit of the United States *ex rel.* John Fisher, Tutor, etc., et al. vs. Board of Liquidation of the City Debt, is still pending and undecided in the said Court of Appeals.

II. That the said decree of the said Court of Appeals, and also of the said Circuit Court, especially so much of the same as denied to defendant the right to plead and prove that the Circuit Court was without jurisdiction, by reason of the want of the requisite citizenship of the complainant, or that she was not an alien, notwithstanding her description of herself as such in her will, were wholly unsupported by law or evidence; that the action of the said Circuit Court upon defendant's offer to plead and make proof of the want of capacity of complainant to maintain this suit, and that of the said Court of Appeals in affirming the correctness of said action, was arbitrary and oppressive, and amounted to a denial of justice.

III. That the Court of Appeals erred in increasing the amount for which the decree was rendered by the Circuit Court, by nearly doubling it, in consequence of its allowance of interest from January 24th, 1881; that the acquiescence of cross appellants in the decree of the Circuit Court, shown by said record of Board of Liquidation vs. John Fisher, Tutor, etc., et al., before the court simultaneously with the record of the present case, showed thot cross-appellee was without right to complain of the decree hereid, in any respect.

That for the sake of convenience petitioner attaches hereto, as part hereof, an assignment of error, containing, in itself, all errors relied upon to support the petition, reserving the benefit of each, all and any assignment of errors contained in the body of the petition.

Wherefore, petitioner respectfully prays, that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this court, on a day certain, to be therein designated, a full and complete transcript of the record, and all the proceedings of the said Circuit Court of Appeals, in said case, therein entitled The City of New Orleans, Appellant, vs. John Fisner, Tutor, etc., et al., No. 747, to the end that said case may be reviewed and determined by this court, as provided by section 6 of the act of congress, entitled "An Act to Establish Circuit Courts of Appeals, and to define and regulate, in certain

cases, the jurisdiction of the courts of the United States, and for other purposes," approved March 3d, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said decree of the Circuit Court of Appeals in said suit, and every part thereof, may be reversed by this Honorable Court.

And your petititioner will ever pray, etc.

SAMUEL L. GILMORE,
City Attorney.
JAMES J. McLOUGHLIN,
Assistant City Attorney.
BRANCH K. MILLER,
*Solicitors for Petitioner.*

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
CITY OF NEW ORLEANS.

Walter C. Flower, being duly sworn, deposes and says: That he is the mayor of the city of New Orleans, plaintiff in the suit of the City of New Orleans, Appellant, vs. John Fisher, Tutor, etc., et al., Appellee, No. —— of the docket of the United States Circuit Court of Appeals for the Fifth Circuit; that he has read the foregoing petition, and the facts therein stated, are true to the best of his knowledge and belief.

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
CITY OF NEW ORLEANS.

Samuel L. Gilmore, being duly sworn, deposes and says: That he is city attorney of the city of New Orleans; that as such, he has personal charge of the said city in the foregoing petion mentioned, in the United States Circuit Court of Appeals for the Fifth Circuit; that he has read the said petition, by him subscribed, and the facts therein stated are true, to the best of his knowledge and belief.

EXHIBIT "A."

PETITION FOR MANDAMUS.

Filed June 2, 1898.

U. S. EX REL. JOHN FISHER, TUTOR, ETC.,

versus

BOARD OF LIQUIDATION.

No. 12,740.

To the Hon. the Circuit Court of the United States for the Eastern District of Louisiana:

The petition of the U. S. ex rel. John Fisher, the duly qualified natural tutor of his minor children, John B. Fisher, James M. Fisher, Wm. G. Fisher and R. B. Fisher, herein joined by U. Koen and U. Koen and Co., F. J. Gasquet, Mary Quinlan, Jean Pomes, G. T Young, Mrs. Mary Fortier, Mrs. A. B. Gage, E. F. Duclaux, said John Fisher being a citizen of Great Britain, respectfully represents:

That your relators have obtained a final decree in equity which is now executory, against the city of New Orleans, a citizen of Louisiana, under No. 12,516 of the docket of this Hon. Court for the sum of ($71,938.74) seventy-one thousand nine hundred and thirty-eight 74-100 dollars with legal interest from Feby. 21st, 1898, and costs, as appears by said judgment and proceedings hereto annexed and made part hereof;

That relators in accordance with the requisites of Act No. 5, of the extra session of 1870, of the Legislature of this State, have duly registered their said judgment in the office of the comptroller of this city;

That relators have made an amicable demand on the Board of Liquidation of the city debt, to pay or fund said judgment, but they have refused to comply with said demand on the ground that said judgment is not fundable;

Your relators aver that said judgment was obtained against said city of New Orleans for moneys had and received by the city of New Orleans during the years 1871 to 1878, for the benefit of relators, and which the said city appropriated to its own use;

That said claims having arisen during the years 1878 and prior years, are fundable and are to be paid by the Board of Liquidation under Acts No. 67, of 1884, and No. 110, of 1890.

Wherefore, relators pray that a writ of mandamus issue herein, directing the Board of Liquidation of the city debt to fund or pay the said judgment obtained by relators against the city of New Orleans, on the 21st of February, 1898, with interest and costs, or show cause, on such a day as this honorable court may fix, why said writ of mandamus should not be made peremptory, and relators pray for costs and for general relief.

(Signed) E. HOWARD McCALEB,
(Signed) CHAS. LOUQUE.
*Atty. U. Koen and Mrs. A. B. Gage.*

John Fisher, Tutor, etc., and U. Koen, E. F. Duclaux, Jean Pomes, F. J. Quinlan, the duly qualified agent of Mary Quinlan, being duly sworn, say that all the facts and allegation of the foregoing petition for mandamus, are true and correct.

(Signed) J. POMES,
" E. F. DUCLAUX,
" JOHN FISHER, *Tutor*,
" U. KOEN for self and
U. KOEN & CO.,
" F. J. QUINLAN.

Sworn to and subscribed before me this 2d day of June, 1898.
(Signed) EMILE POMES,
*Not. Pub.*

Charles Louque, being sworn, says that F. J. Gasquet is absent from this State, and that all the facts and allegations of the foregoing petition are true and correct.

(Signed) CHARLES LOUQUE,

Sworn to and subscribed before me this 2d day of June, 1898.
(Signed) H. J. CARTER,
*U. S. Commissioner.*

Order.

Let the defendant, the Board of Liquidation, show cause, on Friday, June 10th, 1898, at 11 A. M., why a writ of mandamus should not issue as prayed for.

(Signed) CHARLES PARLANGE,
*U. S. Judge.*

New Orleans, June 2d, 1898.

Marshal's Return.

Received by U. S. Marshal, New Orleans, La., June 3d, 1898, and

on the same day I served copy hereof on the Board of Liquidation of the City Debt by handing same to R. M. Walmsley, president thereof, in person, in the city of New Orleans, La.

(Signed) J. V. GUILLOTTE,
*U. S. Marshal.*
by JOHN EARLY,
*Dy. U. S. Marshal.*

## ANSWER AND RETURN OF DEFENDANT.

Filed June 14, 1898.

United States ex rel. John Fisher, Tutor et al., vs. Board of Liquidation City Debt. } No. 12,740.

Now, comes the Board of Liquidation of the city debt, defendant herein, and for answer and return to the alternative order or writ of mandamus, and the rule to show cause why a mandamus should not issue, as herein prayed for, says:

It denies all and singular the allegations contained in the petition of relators, except so far as may hereinafter be specially admitted.

Further answering, defendant specially denies that the judgment or decree described in relators' petition is of the class which is entitled to be funded, or which defendant has the right to fund, under the law, particularly under the acts of the General Assembly of the State of Louisiana, Nos. 67, of 1884, and 110, of 1890.

Respondent specially denies that the said judgment or decree represents or is a claim or claims created for or against the year 1878 or any previous year;

Respondent further denies that the said judgment or decree is founded upon any floating debt or debts, or claim or claims, in the sense of the laws governing its action, particularly the said two acts of the General Assembly.

That the said judgment or decree is not based upon any liability of the city of New Orleans arising from contract; but is founded upon a cause of action arising from tort or torts for the funding of which class of indebtedness there is no want or authority in law.

Wherefore, respondent prays that relators' demand be rejected; the alternative writ of mandamus and the rule to show cause herein be discharged, and relators' suit be dismissed with costs, and for general relief.

(Signed) BRANCH K. MILLER,
*Solicitor and Attorney for Respondent.*

### Affidavit.

Personally came and appeared before me the undersigned author-

ity, R. M. Walmsley, who, being first duly sworn, says, that he is the president of the Board of Liquidation of the city debt, defendant in this suit, and that the facts set forth and the allegations in the foregoing answer are true and correct.

(Signed) R. M. WALMSLEY.

Sworn to and subscribed before me, notary, at New Orleans, Louisiana, this thirteenth day of June, eighteen hundred and ninety-eight.

(Signed) EDGAR GRIMA,
*Not. Pub.*

JUDGMENT.

Extract from the Judgment Book.

April Term, 1898.

Circuit Court of the United States, Fifth Circuit and Eastern District of La., New Orleans Division.

New Orleans, Friday, June 17, 1898.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, District Judge.

U. S. ex rel. John Fisher, Tutor, et als., vs. Board of Liquidation of the City Debt. } No. 12,740.

Considering the verdict of the jury in this cause: It is ordered, adjudged and decreed that a peremptory writ of mandamus be issued to the Board of Liquidation of the City Debt, of New Orleans, commanding them and each of them, to fund or pay the decree obtained and rendered in the case of Mrs. M. M. Fisher vs. The City of New Orleans, No. 12,516 of the docket of this honorable court, to-wit: the sum of seventy-one thousand nine and thirty-eight and 78-100 dollars with 5 per cent. interest on $71,139.60 from February 21, 1898, and $799.18 from May 10, 1896, until paid, and all costs of said suit and also the costs of these proceedings.

Judgments rendered June 17, 1898.

Judgments signed June 23, 1898.

(Signed) CHARLES PARLANGE,
*Judge.*